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2-28-2002

## State of New York Public Employment Relations Board Decisions from February 28, 2002

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from February 28, 2002

### Keywords

NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

### Comments

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**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

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In the Matter of

**ROCKLAND COUNTY DISTRICT ATTORNEY'S  
CRIMINAL INVESTIGATOR'S ASSOCIATION,**

Petitioner,

- and -

**CASE NO. CP-720**

**COUNTY OF ROCKLAND,**

Employer.

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**JOHN K. GRANT, ESQ, for Petitioner**

**PATRICIA ZUGIBE, COUNTY ATTORNEY (JEFFREY J. FORTUNATO of  
counsel), for Employer**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Rockland County District Attorney's Criminal Investigator's Association (Association) to a decision of an Administrative Law Judge (ALJ) dismissing its unit clarification/unit placement petition which sought a determination that the newly-created title of undercover unit supervisor is, or should be, included in the unit it represents of criminal investigators employed by the District Attorney's Office of the County of Rockland (County).

The ALJ limited the record to the parties' pleadings and correspondence clarifying the relevant facts, after she determined that no hearing was necessary on the threshold issue of whether employees who were not eligible for interest arbitration pursuant to §209.4 of the Public Employees' Fair Employment Act (Act) were properly

included in a unit of employees who were subject to that provision of the Act. The ALJ instructed the parties to brief the issue and, after receipt of the parties' briefs, issued a decision that dismissed both the unit clarification and unit placement aspects of the Association's petition.

Finding that the title of undercover unit supervisor was not listed in the parties' contractual recognition clause and not included in the unit, the ALJ dismissed the unit clarification aspect of the petition. Determining that the at-issue title was not included in §209.4 of the Act among those titles employed in a county district attorney's office eligible for compulsory interest arbitration, the ALJ determined that the title was not eligible for interest arbitration and could not be placed in the unit represented by the Association, as all the titles already in the unit were eligible for interest arbitration pursuant to §209.4 of the Act.

#### EXCEPTIONS

The Association excepts to the ALJ's decision, arguing that it was entitled to a hearing even on the limited, threshold, issue addressed in the ALJ's decision. Arguing that the ALJ erred in determining that the at-issue title was not included in its unit because the duties of the undercover unit supervisor are identical or substantially similar to the duties of unit titles, the Association asserted that the unit clarification portion of its petition should have been granted. The Association further argued that the title of undercover unit supervisor is eligible for compulsory interest arbitration or, even if not so eligible, is nonetheless appropriately placed in its unit because the unit already includes a title, child abuse investigator, that is not eligible for interest arbitration.

Finally, the Association argues that the ALJ erred in determining that a hearing was not necessary. The County supports the ALJ's decision.

### FACTS

In 1983, the Board certified the Association as the exclusive bargaining representative of a unit of employees in the titles of criminal investigator, senior criminal investigator and criminal investigator-electronic surveillance.<sup>1</sup> The provisions of the parties' collective bargaining agreement now define the unit as including the titles of child abuse investigator, criminal investigators, senior criminal investigators and confidential criminal investigator.<sup>2</sup> The position of child abuse investigator is currently vacant and the County alleges in its pleadings that the title was abolished in 1991. The Association does not dispute the County's assertion, although it refers to the position as "allegedly" abolished, relying on the continued inclusion of the title in the recognition clause.

By virtue of the enactment of Chapter 485 of the Laws of 1990 and Chapter 723 of the Laws of 1991, the titles of detective-investigator and criminal investigator, respectively, were included in §209.4 of the Act, which provides the named titles with eligibility for the compulsory interest arbitration procedures set forth in §209 of the Act.

The Association asserts that the duties of the at-issue title of undercover unit supervisor are identical or substantially similar to the duties of the criminal investigators

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<sup>1</sup>*County of Rockland*, 16 PERB ¶3000.22 (1983).

<sup>2</sup>The parties' memorandum of understanding extending the term of their January 1, 1996 to December 31, 1998 collective bargaining agreement for the period January 1, 1999 to December 30, 2002, did not alter the recognition clause or the titles included therein.

within its unit. In dismissing the petition, the ALJ did not make a determination as to the duties actually performed by the undercover unit supervisor.

### DISCUSSION

In our recent decision in *State of New York*,<sup>3</sup> we emphasized that titles which do not have the same dispute resolution procedures are not appropriately placed in the same unit.<sup>4</sup> Here, there is no dispute that the undercover unit supervisor is not a title listed in §209.4 of the Act which is eligible for interest arbitration. As was noted in an earlier decision involving these parties:

[t]he amendments which extended the applicability of §209.4 [of the Act] to certain employees in a district attorney's office did not do so generically, e.g., investigative employees or, arguably, investigators, but by specific titles, i.e., detective-investigators (L. 1990, c. 485) and criminal investigators (L. 1991, c. 723). PERB's "no position" recommendation on the 1990 amendment characterized the amendment as including "detective-investigators" among the "classifications" entitled to interest arbitration and the sponsor's memorandum for the Assembly bill (1326-A) which became the 1991 amendment referenced coverage of the "title" of detective-investigator. The above factors bespeak the legislature's intent to extend the coverage under §209.4 of the Act based on titles rather than functions.<sup>5</sup>

Turning to the specifics of the ALJ's analysis, we find that the ALJ correctly dismissed the unit clarification aspect of the petition because the at-issue title is not one

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<sup>3</sup>34 PERB ¶3038, at 3093 n.22 (2001).

<sup>4</sup>See also *City of Lockport*, 30 PERB ¶3049 (1997).

<sup>5</sup>*County of Rockland*, 32 PERB ¶4017, at 4043, *aff'd*, 32 PERB ¶3074 (1999), *confirmed*, 34 PERB ¶7019 (Sup. Ct. Albany County 2001).

of the titles listed in the recognition clause of the parties' collective bargaining agreement.<sup>6</sup>

The Association also argued that the unit clarification petition should be granted because the undercover unit supervisor is included in its unit because of an identity or similarity with the investigative titles in the unit. Addressing this argument, the ALJ, relying on our holding in *Rye City School District*,<sup>7</sup> took into account the scope of the existing unit, which allows for the consideration of other factors, such as community of interest. Given the disparate dispute resolution procedures enjoyed by the criminal investigators as opposed to the undercover unit supervisor, the ALJ found essentially that there was no community of interest because there was no "substantial similarity" between the two titles, regardless of whatever else the titles might share. Finding that there was a fundamental dissimilarity between the unit titles and the undercover unit supervisor based upon their eligibility, or lack thereof, for interest arbitration, the ALJ correctly found the Association's alternate argument in support of the unit clarification aspect of the petition to be without merit.

The Association's reliance on the initial uniting decision creating the unit of criminal investigators in the district attorney's office is misplaced. While the initial unit was created based upon the "police duties" performed by the criminal investigators in the district attorney's office, as we have noted, ensuing legislation granted eligibility for

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<sup>6</sup>*County of Orange and Sheriff of Orange County*, 25 PERB ¶3049 (1992), confirmed sub nom. *Orange County Deputy Sheriff's Ass'n v. PERB*, 26 PERB ¶7004 (Sup. Ct. Rockland County 1993).

<sup>7</sup>33 PERB ¶3053 (2000).

interest arbitration to the titles of criminal investigator and detective-investigator. Any subsequent decisions regarding the makeup of that unit must take into account the dispute resolution procedures applicable to the titles in the unit and applicable to any titles that are proposed for inclusion in the unit.<sup>8</sup>

Turning to the unit placement portion of the petition, the ALJ properly relied on earlier Board decisions which recognized the inappropriateness of combining titles that are not entitled to compulsory interest arbitration with titles that are eligible for interest arbitration.<sup>9</sup> As we have previously found, the "most appropriate unit" cannot include titles that are subject to different dispute resolution procedures.<sup>10</sup>

Finally, we deny the Association's exception to the ALJ's determination that no hearing would be held on the unit clarification aspect of the petition. A hearing is not required in a representation proceeding; the investigation required by §201.9 of the Rules may be conducted on the pleadings and such additional submissions as directed by the Director of Public Employment Practices and Representation or the assigned ALJ.<sup>11</sup> The ALJ has the authority in the processing of any improper practice charge or representation case to limit the record to the facts relevant to the issues presented in

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<sup>8</sup>*County of Rockland, supra* note 5.

<sup>9</sup>*See City of Lockport, supra* note 4. *See also Village of Skaneateles*, 16 PERB ¶3070 (1983).

<sup>10</sup>*See State of New York, supra; City of Lockport, id.*

<sup>11</sup>*Bethpage Union Free Sch. Dist.*, 15 PERB ¶3094 (1982).



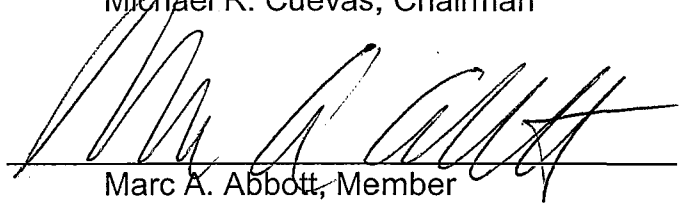
the case and to determine that there are no relevant facts in dispute that warrant a hearing.<sup>12</sup>

Based upon the foregoing, the decision of the ALJ is affirmed. Accordingly, the petition is dismissed in its entirety. SO ORDERED.

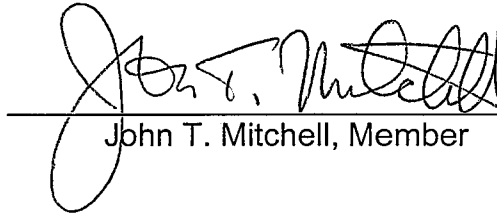
DATED: February 28, 2002  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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<sup>12</sup>*Comsewogue Union Free Sch. Dist.*, 15 PERB ¶3018 (1982). See also *Village of Belmont*, 34 PERB ¶3008 (2001); *Board of Educ. of the City Sch. Dist. of City of New York*, 16 PERB ¶3048 (1983).

**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

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In the Matter of

**BEAVER RIVER CENTRAL SCHOOL DISTRICT  
NON-INSTRUCTIONAL EMPLOYEES  
ASSOCIATION/NYSUT/AFT/AFL-CIO,**

Petitioner,

- and -

**CASE NO. C-5140**

**BEAVER RIVER CENTRAL SCHOOL DISTRICT,**

Employer.

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**SHEILA F. PATTERSON, for Petitioner**

**TRACY R. SCHOLZ, for Employer**

**BOARD DECISION AND ORDER**

On November 7, 2001, the Director of Public Employment Practices and Representation (Director) determined that the Beaver River Central School District Non-Instructional Employees Association/NYSUT/AFT/AFL-CIO (Association) was eligible pursuant to §201.9(g)(1) of our Rules of Procedure (Rules) for certification without an election as the representative of the bargaining unit of certain employees of the Beaver River Central School District (District).

By order of the Board, dated December 6, 2001, the matter was remanded to the Director for further investigation.<sup>1</sup>

This matter comes to us on exceptions filed by the District to the Director's subsequent decision, dated January 11, 2002, in which he determined, after conducting an investigation, that the Association was eligible for certification without an election.

#### EXCEPTIONS

The District excepts to the Director's decision principally on the grounds that the current membership list submitted by the Association is not conclusive proof of the employees' true interest in representation by the Association. The Association submitted its response to the District's exceptions, arguing that it had satisfied the requirements of §201.9(g)(1) of the Rules for certification without an election.

#### DISCUSSION

Part 201 of our Rules governs the determination of representation status under the Public Employees' Fair Employment Act (Act). Section 201.9(g)(1) delegates to the Director the responsibility of disposing of the questions concerning representation after an investigation or hearing. Specifically, §201.9(g)(1) authorizes the Director to determine whether employee support is sufficient for certification without an election.

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<sup>1</sup>See *Beaver River Cent. Sch. Dist.*, 34 PERB ¶3039 (2001).

An employee organization may be certified without an election if it establishes that a majority of the employees within the unit support the employee organization.<sup>2</sup>

The District contends, in its exceptions, that a list of current members in the Association is inconclusive evidence of the employees' choice of a representative.

We disagree.

Although §201.9(g)(1) of the Rules describes two types of documentary evidence that are considered by the Board in a certification without an election decision, i.e., current dues deduction authorization cards or individual designation cards executed within six months of the Director's decision, the Board early determined that the identification of such evidence was descriptive of proofs of support that could be submitted and not prescriptive.<sup>3</sup> The Act does not restrict the Board from accepting "other evidences", including current membership lists, of the employees' choice of bargaining unit representative, and the Board has done so repeatedly.<sup>4</sup>

The Board initially remanded this matter to the Director for further investigation. Having completed the investigation, the Director determined that the Association had

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<sup>2</sup>*Bethlehem Public Library*, 23 PERB ¶3009 (1990).

<sup>3</sup>*Town of Islip*, 8 PERB ¶3049 (1975).

<sup>4</sup>Act, §207.2. See also *Corinth Cent. Sch. Dist.*, 20 PERB ¶4028 (1987), confirmed, 20 PERB ¶3000.23 (1987); *Argyle Cent. Sch. Dist.*, 20 PERB ¶4027 (1987), confirmed, 20 PERB ¶3000.21a (1987); *County of Wayne*, 15 PERB ¶4083 (1982), confirmed, 15 PERB ¶3000.55 (1982) [membership lists held sufficient evidence of majority support to satisfy Rules, §201.9(g)(1)].

submitted evidence that satisfied the criteria of §201.9(g)(1) of the Rules as interpreted and applied by the Board.<sup>5</sup> We agree.

IT IS HEREBY CERTIFIED that the Beaver River Central School District Non-Instructional Employees Association/NYSUT/AFT/AFL-CIO has been designated and selected by a majority of the employees of the Beaver River Central School District, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time and part-time non-instructional employees, including, but not limited to: Elementary Office Secretary, Guidance Office Secretaries, Middle School Office/CSE Secretary, Transportation/High School Office Secretary, Teacher Aides, 1:1 Aides, Playground Aides, Elementary Cafeteria Aide, Elementary Library Aide, High School Library/Learning Center Aide, High School Cafeteria/Study Hall Aide, Study Hall Aides, Playground/Bus Aide, High School Cafeteria/Study Hall/Laundry Aide, Kindergarten Aide, Bus Drivers, Teacher Aide/Clerical Aide, Playground/Bus Aide, Computer Coordinator, AV Coordinator, Nurses (full and part-time), Food Service Workers, Cook, Baker, Cashier/Food Service, Assistant Cook/Baker, Cleaners, Custodians, Mechanic, Custodian/Maintenance, Maintenance/Assistant Head Custodian and Head Mechanic.

Excluded: Substitutes, Business Office Secretaries, Building/Grounds Supervisor, Food Service Manager.

FURTHER, IT IS ORDERED that the above-named public employer shall negotiate collectively with the Beaver River Central School District Non-Instructional Employees Association/NYSUT/AFT/AFL-CIO. The duty to negotiate collectively

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<sup>5</sup>The Association submitted evidence that 50 of the 84 employees in the petitioned-for bargaining unit are members of the Association.

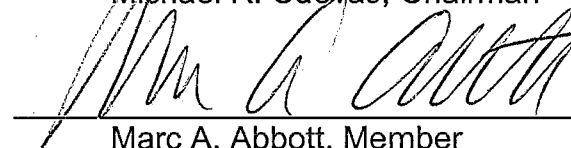
includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party.

Such obligation does not compel either party to agree to a proposal or require the making of a concession.

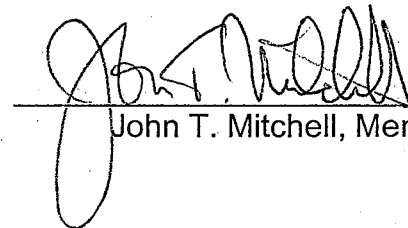
DATED: February 28, 2002  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

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In the Matter of

**NEWARK VALLEY CARDINAL BUS DRIVERS,  
NYSUT/AFT/AFL-CIO, LOCAL 4360**

**CASE NO. DR-090**

**Upon a Petition for Declaratory Ruling**

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**BRADLEY J. OVER, for NEWARK VALLEY CARDINAL BUS DRIVERS,  
NYSUT/AFT/AFL-CIO, LOCAL 4360**

**HOGAN & SARZYNSKI, LLP, (JAMES A. GREGORY of counsel) for  
NEWARK VALLEY CENTRAL SCHOOL DISTRICT**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Newark Valley Central School District (District) to a decision of an Administrative Law Judge (ALJ) on a petition for a declaratory ruling filed by the Newark Valley Cardinal Bus Drivers, NYSUT/AFT/AFL-CIO, Local 4360 (NYSUT). The petition sought a determination as to the negotiability of a demand proposed by NYSUT during negotiations for a successor collective bargaining agreement with the District. NYSUT's demand is that "The District will reimburse the cost of fingerprinting for new hires as well as current employees who are required to provide fingerprints." The District's position is that the demand is nonmandatory.

The case was submitted to the ALJ on a stipulated record. The ALJ determined that the demand was one which sought reimbursement for a unit employee for a fee or cost associated with the employee's position and was, therefore, a demand for compensation and mandatorily negotiable.

### EXCEPTIONS

The District excepts to the ALJ's decision, arguing that the demand is for a pre-hire inducement and nonmandatory. The District further asserts that the demand deals with fees paid by nonunit members as well as unit members and is, therefore, nonmandatory and that NYSUT is attempting to negotiate for prospective employees whom it does not represent.<sup>1</sup> Finally, the District argues that the ALJ erred by noting that the cost to the District for reimbursement of fingerprinting fees might be an allowable cost subject to State aid. NYSUT supports the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we reverse the decision of the ALJ.

### FACTS

Section 305.30 of the NYS Education Law and §509-d(2) of the NYS Vehicle and Traffic Law provide that school bus drivers must be fingerprinted to allow school districts to complete mandatory criminal background checks with Federal and New York State authorities. Because of the statutory mandate, the in-issue demand does not seek to negotiate the requirement that prospective employees or current employees be fingerprinted, it only seeks that reimbursement be paid to new employees for the costs attendant to the required tests.

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<sup>1</sup>As the parties' arguments focus on the demand as it relates to non-unit employees, we need not determine whether and to what extent the demand, if limited solely to reimbursement of current unit employees who may be fingerprinted for promotion or job retention, is mandatory.



DISCUSSION

In *State of New York*,<sup>2</sup> we held that a fee imposed by the State upon all applicants for competitive civil service examinations did not involve a mandatory subject of negotiations because it was applicable to the public at large and not just unit employees. Here, fingerprinting of all job applicants is mandated by State law and the fee is paid by all applicants, whether or not they subsequently are hired by the District. As such, the cost of the fingerprinting is like the cost for civil service examinations: a pre-employment expense applicable to the public at large.

The cases relied upon by the ALJ are distinguishable. They relate to post-employment "[c]ompensation for satisfactory performance in a job [which] is a term and condition of employment."<sup>3</sup> While we have held that a bargaining agent may negotiate for compensation for prospective and new unit employees,<sup>4</sup> or reimbursement for expenses incurred by successful job applicants, those cases involved terms and conditions of employment of the unit employees once they became unit employees. In *County of Tompkins, supra*, for example, we found that reimbursement for moving expenses that was tied to successful completion of a year in the unit position was a mandatory subject of negotiation because it was "compensation not only for taking the job, but for also performing satisfactorily in it for one year."<sup>5</sup> In *City of Mount Vernon*,<sup>6</sup>

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<sup>2</sup>13 PERB ¶3099 (1980).

<sup>3</sup>*County of Tompkins*, 10 PERB ¶3066, at 3117-8 (1977).

<sup>4</sup>*Old Brookville Policemen's Benevolent Ass'n, Inc.*, 16 PERB ¶3094 (1983).

<sup>5</sup>*Supra*, note 3 at 3117.

<sup>6</sup>18 PERB ¶3020 (1985).

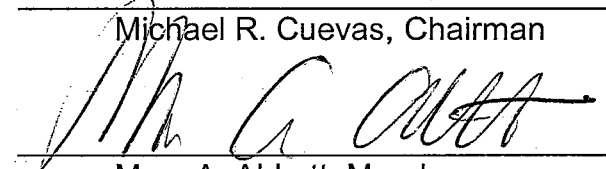
we held that the City's imposition of a requirement that new employees reimburse the City for the cost of training them if they left the City's employ within three years was improper because it was not a qualification issue but a compensation issue. The City chose to train new employees after they became unit employees, not to require the training be completed by job applicants prior to their application for employment. We find that the instant demand, which is for reimbursement for a pre-employment expense, is not a term and condition of employment of unit employees.

Because of our finding, we need not reach the other exceptions raised by the District. Based on the foregoing, we grant the District's exceptions and reverse the decision of the ALJ.

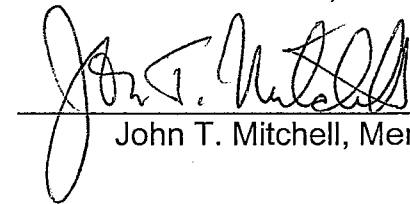
DATED: February 28, 2002  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

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In the Matter of

**SOUTH NYACK/GRAND VIEW JOINT POLICE  
ADMINISTRATION BOARD,**

**CASE NO. DR-0102**

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**Upon a Petition for Declaratory Ruling**

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**DORIS F. ULMAN, ESQ., for Petitioner**

**BOARD DECISION AND ORDER**

This matter comes to us on exceptions filed by the South Nyack/Grand View Joint Police Administration Board (Police Board) to the determination of the Director of Public Employment Practices and Representation (Director) that a declaratory ruling petition filed by the Police Board, which sought a determination regarding the negotiability of a demand of the Rockland County Patrolmen's Benevolent Association, Inc. (PBA) in its petition for compulsory interest arbitration, would be administratively closed.<sup>1</sup>

**FACTS**

On December 13, 2001, the PBA filed its petition for interest arbitration with the Public Employment Relations Board (Board). On December 24, 2001, the Police Board

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<sup>1</sup>While the Director's letter administratively closed the case, it was based upon a determination that the petition was deficient. We are, therefore, for the purposes of deciding the Police Board's exceptions, treating the Director's determination as a deficiency dismissal.

filed its petition for a declaratory ruling with the Director.<sup>2</sup> On January 2, 2002, the Assistant Director of Public Employment Practices and Representation (Assistant Director) sent the Police Board a notice advising them that their petition was deficient for the reason that the "Petition is not 'on the form provided by the director' nor is it 'sworn to' or otherwise in compliance with Section 210.1 of the [PERB's Rules of Procedure (Rules)]."

On January 9, 2002, the Police Board filed an amended petition on the prescribed form sworn to by the attorney representing the Police Board. By letter dated January 14, 2002, the Assistant Director informed the Police Board that its amended petition:

cannot amend the prior pleading as that was a nullity; it must be treated as a new filing. Assuming December 13, 2001, which is stated in ¶4 of the Petition as being the date of the at-issue demand, the Petition is untimely as not being in compliance with Section 205.6(c) of the Rules.<sup>3</sup>

By letter dated January 31, 2002, the Director informed the Police Board that since he had not received a withdrawal letter, as instructed in the Assistant Director's letter of January 14, 2002, the matter was being administratively closed.

On February 4, 2002, the Police Board filed its exceptions.

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<sup>2</sup>This petition was not drafted on the form prescribed by the Board and, thus, left out certain relevant facts.

<sup>3</sup>Notwithstanding the Assistant Director's determination, §205.6(c) of our Rules requires that a petition for declaratory ruling may not be filed after the date of the filing of the response to the petition for interest arbitration. The Police Board's January 9, 2002 filing of the declaratory ruling petition on PERB's form was not, therefore, timely as it was not filed simultaneously with its response to the PBA's petition.

### EXCEPTIONS

The Police Board excepts to the Director's determination on the grounds that he erred on the law and specifically that its petition dated December 24, 2001, was timely and contained all the items set forth in PERB's Rules, §210.1.

The PBA submitted its response that supported the Director's determination.

### DISCUSSION

The Police Board argues that its petition dated December 24, 2001 was valid and timely and contained all items set forth in §210.1 of the Rules. Consequently, if we were to accept its argument, our inquiry would end. However, its argument is incorrect for the reasons hereinafter stated.

Section 210.1(a) of the Rules specifies that the petition shall be in writing on a form provided by the director and shall be signed and sworn to before any person authorized to administer oaths.

Part 210 was added on May 8, 1987. Effective that same date, §205.6(a) of the Rules was amended and a new subsection (c) was added to permit an objection to arbitrability to be raised not only by an improper practice charge but also by a declaratory ruling petition, but only if it were filed within ten working days after the receipt of the petition for interest arbitration or the response thereto.<sup>4</sup>

That subsection also requires that, if filed by the respondent, a petition for declaratory ruling may not be filed after the date of the filing of the response to the petition for interest arbitration.

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<sup>4</sup>*Fulton Firefighters Ass'n, Local 3063, IAFF, AFL-CIO*, 29 PERB ¶6501, at 6502 (1996).

As we held in *Fulton Firefighters*,<sup>5</sup>

Two points are clear from the history and development of the cited Rules. The first is that declaratory ruling petitions have application and purpose apart from the interest arbitration context. The second is that although a declaratory ruling petition is a proper mechanism for raising an objection to arbitrability, if used for that purpose or to that effect, the filing must satisfy the specific requirements of Rule §205.6, not the general requirements of Part 210.

The Police Board is essentially arguing that, by demanding the use of our form rather than its original petition, we have placed form over substance. To accept the Police Board's argument would require the Board to accept all filings in any form, so long as they contain sufficient information to determine their purpose. Our Rules require that petitions for declaratory rulings be on a form provided by the Director.<sup>6</sup> Such forms require certain information which we have determined is necessary for the processing of such a petition.

On the contrary, there are no prescribed forms for the petition for interest arbitration or the response to the interest arbitration petition.<sup>7</sup> Where we have not specified that PERB forms be used, the parties are afforded some latitude in their pleadings. But, where our Rules require the use of our forms, we have strictly enforced those Rule requirements, especially when the pleading, such as the petition for declaratory ruling on a scope issue related to interest arbitration, commences the

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<sup>5</sup>*Id.*

<sup>6</sup>Rules, §210.1(a).

<sup>7</sup>Rules, §205.4 and §205.5.

adjudicatory process.<sup>8</sup> Our form requires specific information necessary to determine whether the petition has been timely filed in accordance with §205.6(c) of our Rules.

If, as urged by the Police Board, we were to accept any filing proffered by a party, we would be required to review the filing to ascertain whether all of the required information was included, rather than to be presented with the information in an efficient and appropriate manner, as we are when the forms we have developed for that purpose are utilized. We have consistently rejected such arguments because such an interpretation of our Rules would render meaningless their expressed, unambiguous requirements that certain filings be on a form prescribed and/or provided by the Board.<sup>9</sup>

The Police Board's response to the petition for interest arbitration and its original declaratory ruling petition were filed on December 24, 2001. Our Rules require that a respondent's petition for declaratory ruling may not be filed after its response to the petition for interest arbitration. The Police Board's initial filing of a request for declaratory ruling was a nullity as it was not on our form. Therefore, no subsequent filing of a declaratory ruling petition by the Police Board could be considered timely filed, as it would not have been filed simultaneously with its response to the petition for interest arbitration. Since the Police Board failed to observe our Rules in the first instance, the manner in which the Assistant Director and Director processed the Police Board's petition affords it no grounds for reversing the Director's determination to

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<sup>8</sup>See, e.g., *Village of Highland Falls*, 30 PERB ¶6601(1997).

<sup>9</sup>See *County of Broome (Sheriff's Dep't)*, 32 PERB ¶3054 (1999); *Village of Highland Falls, supra*; *Jacob K. Javits Convention Ctr.*, 19 PERB ¶3056 (1986).

administratively close the case.<sup>10</sup> We have long held that we may not disregard our Rules and accept a petition which is not timely.<sup>11</sup>

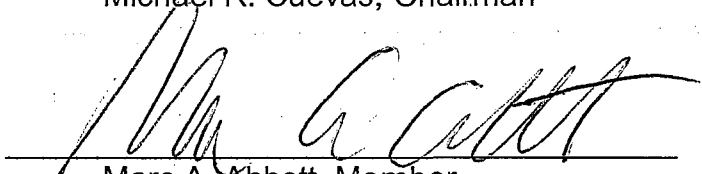
Based upon the foregoing, we deny the exceptions filed by the Police Board and affirm the determination of the Director.

IT IS, THEREFORE, ORDERED that the petition must be, and it hereby is, dismissed.

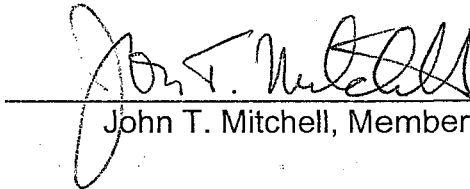
DATED: February 28, 2002  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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<sup>10</sup>*Id.*

<sup>11</sup>See *Cattaraugus County Chapter of CSEA v. PERB*, 3 PERB ¶7005 (Sup. Ct. Rensselaer County 1970).



**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

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In the Matter of

**NEW YORK CITY TRANSIT AUTHORITY,**

Charging Party,

- and -

**CASE NO. U-22997**

**TRANSPORT WORKERS UNION OF GREATER  
NEW YORK, LOCAL 100,**

Respondent.

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**RICHARD SCHOOLMAN, ESQ., for Charging Party**

**BOARD DECISION AND ORDER**

This matter comes to us on exceptions to a decision of the Director of Public Employment Practices and Representation (Director) dismissing as deficient an improper practice charge filed by the New York City Transit Authority (Authority) alleging that the Transport Workers Union of Greater New York, Local 100 (TWU) violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act) by repudiating a portion of the parties' current collective bargaining agreement.

**EXCEPTIONS**

The Authority excepts to the Director's decision on the grounds that he erred on the law by misapplying our prior holding in *Local 589, International Association of Firefighters*.<sup>1</sup>

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<sup>1</sup>24 PERB ¶3022 (1991).

### FACTS

The relevant facts are set forth in the Director's decision.<sup>2</sup> The Authority's improper practice charge alleges, *inter alia*, that the collective bargaining agreement contains a provision for broadbanding. This agreement was negotiated in 1999. In July 2000, the Authority submitted a proposal to the Department of Citywide Administrative Services (DCAS) to consolidate several titles under the broadbanding provisions of the contract. The proposal was administratively approved. In January 2001, several individual Authority employees, who are members of TWU, commenced an Article 78 proceeding in Supreme Court against DCAS, the Authority and TWU in an effort to void the broadbanding provision of the parties' collective bargaining agreement.

On October 10, 2001, the TWU wrote to the judge assigned to the Article 78 petition to explain its position that it believes the petition had merit for the reason that DCAS acted arbitrarily and, thereby, incorrectly by eliminating certain titles under the broadbanding concept.

In addition to the improper practice charge, the Authority also filed an application for injunctive relief with PERB's counsel. On December 11, 2001, the Authority's application was also denied because it was found to be deficient.

### DISCUSSION

The Authority argues that the position taken by the TWU in the Article 78 proceeding over the issue of broadbanding contained in the collective bargaining agreement evidenced its repudiation of the entire agreement. We disagree.

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<sup>2</sup>TWU of Greater NY, Local 100, 35 PERB ¶4502 (2002).

When we have found a repudiation of an agreement, we have held it to be a violation of §209-a.1(d) or §209-a.2(b) of the Act.

Our jurisdiction, however, is constrained by §205.5(d) of the Act which precludes the exercise of our jurisdiction in those situations in which a difference of opinion exists between the parties concerning the proper interpretation of their agreement, and also in those situations in which mere enforcement of the agreement is sought.<sup>3</sup> The alleged denial of the existence of a valid agreement without any colorable claim of right is within our jurisdiction to consider, notwithstanding the limitations in §205.5(d) of the Act.

It is apparent from the charge that the rights the Authority claims derive from the collective bargaining agreement. It is also apparent from the TWU correspondence, relied upon by the Director, that the TWU disputes the manner in which both the Authority and the DCAS have implemented the broadbanding provision contained in the parties' collective bargaining agreement. Nevertheless, TWU asserts that it derives its right from the collective bargaining agreement and it believes that it has a colorable claim to a contract action, which it has commenced against the Authority.<sup>4</sup> As we held in *Board of Education of the City School District of the City of Buffalo*:<sup>5</sup>

[W]e have distinguished a contract repudiation, which is cognizable as an improper practice, from a contract breach or contract enforcement, which is not. In making that distinction, we have emphasized that a meritorious repudiation claim arises only in "extraordinary circumstances" in which a party to the contract denies the existence of an agreement or acts in total disregard of the contract's terms without any colorable claim of right.

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<sup>3</sup>*Connetquot Cent. Sch. Dist.*, 21 PERB ¶3049 (1988).

<sup>4</sup>See TWU letter dated October 10, 2001; see also *Comsewogue Union Free Sch. Dist.*, 27 PERB ¶3047 (1994).

<sup>5</sup>25 PERB ¶3064 (1992).

In reaching his decision, the Director relied upon our prior holding in *Local 589, International Association of Firefighters*,<sup>6</sup> which was illustrative of the extraordinary circumstances that may give rise to a contract repudiation. Here, both parties point to the collective bargaining agreement as support for their respective positions. Neither has denied the existence of an agreement; their disagreement is over the interpretation and effect of certain terms of the agreement.

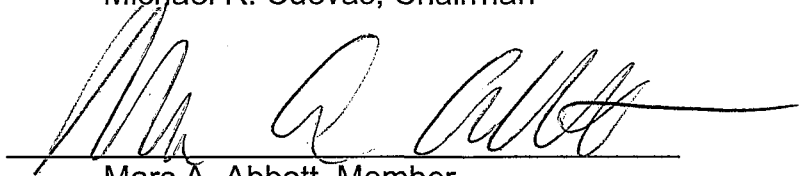
Since it cannot be said from the facts before the Director that TWU has repudiated the collective bargaining agreement, we are, therefore, constrained by the Act from exercising jurisdiction over the parties' contract dispute which does not otherwise give rise to a violation of the Act.

Based upon the foregoing, IT IS HEREBY ORDERED that the charge be, and hereby is, dismissed in its entirety.

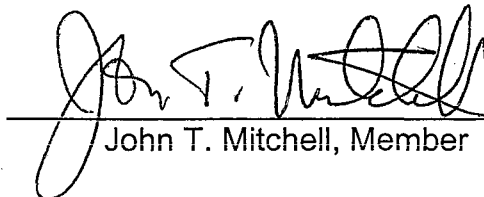
DATED: February 28, 2002  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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<sup>6</sup>*Supra*, note 1.

**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

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In the Matter of

**CITY OF NEW ROCHELLE,**

Charging Party,

- and -

**CASE NO. D-0271**

**UNIFORMED FIRE FIGHTERS ASSOCIATION  
INC., LOCAL 273 of the INTERNATIONAL  
ASSOCIATION OF FIRE FIGHTERS, AFL-CIO,  
ERNEST HORNEY, individually and in his  
capacity as President of UFFA Local 273;  
BYRON GRAY, individually and in his capacity  
as Vice President of UFFA Local 273; MATTHEW  
AMOROSO, individually and in his capacity as  
Secretary/Treasurer of UFFA Local 273; PHILIP  
CICCHIELLO, individually and in his capacity  
as a Trustee of UFFA Local 273; MICHAEL  
BARTHOLOMEW, individually and in his  
capacity as a Trustee of UFFA Local 273,**

Respondents.

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**VINCENT TOOMEY, ESQ., for Charging Party**

**MEYER, SUOZZI, ENGLISH & KLEIN, P.C. (RICHARD S.  
CORENTHAL of counsel), for Respondent**

**BOARD DECISION AND ORDER**

On December 28, 2001, the City of New Rochelle (City) filed a charge which alleged that the Uniformed Fire Fighters Association, Inc., Local 273 of the International Association of Fire Fighters, AFL-CIO, et al. (Association) had violated §210.1 of the

Public Employees' Fair Employment Act (Act) in that it engaged in a strike against the City on each of four Saturdays during the month of December 2001, as well as on Christmas Eve and Christmas Day. The ALJ found that, pursuant to §206.5(d) of the Rules of Procedure (Rules), the Association's failure to file an Answer within the time provided in §206.5(a) of the Rules constituted an admission of the material facts alleged in the charge and an admission that the Association had violated §210.1 of the Act.

At the hearing on February 14, 2002, the parties entered into a stipulation of settlement, which provided, in pertinent part, that the City was withdrawing the charge against the individually-named union officers and trustees; that the respondent Association violated §210 of the Act; that the City and the Association have agreed to resolve numerous pending labor disputes; and that the stipulation of settlement is conditioned upon the Board's acceptance of the facts and the proposed settlement set forth therein.

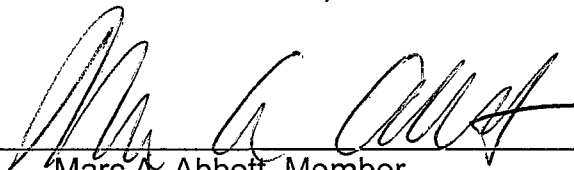
Based upon the ALJ's findings and the stipulation of settlement, we find the Association violated §210.1 of the Act in that it engaged in a strike as charged. We further find that the public inconvenience was limited to the financial impact of calling in additional firefighters on overtime; that the parties are now attempting to repair their damaged labor relationship; and that, as there is no evidence that the Association has previously engaged in any strike activity, a suspension of the dues and agency shop fee deductions of six (6) months is a reasonable one and will effectuate the policies of the Act.

IT IS, THEREFORE, ORDERED that the dues and agency shop fee deduction privileges of the Association, be suspended commencing at the first practicable date and continuing for a period of six (6) months. Thereafter, no dues nor agency shop fee shall be deducted from the salaries of the unit members of the Association until the Association affirms that it no longer asserts the right to strike against any government as required by the provisions of §210.3(g) of the Act.

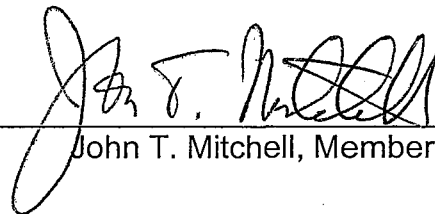
DATED: February 28, 2002  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member